No. 95-566

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MONTANA, PETITIONER

v.

JAMES ALLEN EGELHOFF

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment bars a state from providing that the jury in a criminal case may not consider evidence of the defendant's voluntary intoxication in determining whether he possessed the mental state required for the charged offense.

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INTEREST OF THE UNITED STATES

The Montana Supreme Court concluded that a defendant in a criminal case has a "due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged." Pet. App. 16a. The Federal Rules of Evidence contain a number of exclusionary provisions whose validity might be subject to challenge if this Court were to endorse such a broad due process right. See Fed. R. Evid. 501 (privilege), 704(b) (expert testimony on defendant's mental state when an element of a crime or defense); 802 (hearsay). In addition, Rule 105 provides that when, as a result of those rules, evidence is admitted

only for a limited purpose "the court * * * shall restrict the evidence to its proper scope and instruct the jury accordingly." The United States therefore has an interest in the proper resolution of this case.

STATEMENT

1. Respondent spent most of July 12, 1992, drinking with two companions, Roberta Pavola and John Christianson. That evening, witnesses saw Christianson's station wagon being driven erratically. Around midnight, officers found the station wagon in a ditch. The bodies of Pavola and Christianson were in the front seat; each had been shot in the head. Respondent was lying in the rear cargo area, yelling obscenities. A handgun belonging to respondent was found in the station wagon; forensics testing identified gunshot residue on respondent's hands. Pet. App. 3a-6a.

2. Respondent was charged with two counts of deliberate homicide. Pet. App. 3a. Under Montana law, to convict a defendant of that offense, the State is required to prove that the defendant "purposely or knowingly cause[d] the death of another human being." Mont. Code Ann. § 45-5-102(1)(a) (1993).

At trial, the government introduced evidence that respondent was capable of purposeful action on the night of the murders. For example, while sitting in the back seat of the moving car, respondent apparently used a stick to depress the accelerator so that he could drive. He made an attempt to flee when the station wagon ran off the road, tried to avoid detection by witnesses who approached the vehicle, and kicked a camera out of the hands of a police officer who was attempting to take his picture. Pet. App. 11a-12a; see *id.* at 5a.

Respondent was allowed to introduce evidence of his intoxication on the night of the murders in order to explain his purported inability to remember the events, and in support of a claim that he lacked the level of physical coordination required to drive Christianson's car or to commit the crimes, thus leading to the inference that "a fourth person was responsible for the shootings." Br. in Opp. 1; Pet. App. 10a. Evidence at trial showed that respondent's blood alcohol level was measured at .36 when he was treated at a hospital shortly after the bodies of Pavola and Christianson were discovered. A doctor who examined respondent at the hospital testified that based on respondent's blood alcohol level and his behavior, it was likely that he had suffered an alcoholic "blackout" around the time of the murders. Respondent testified that he remembered almost nothing of what took place that night. Pet. App. 5a-7a.

The trial court instructed the jury that respondent was presumed innocent, that his plea of not guilty was a denial of "every allegation of the charges against him," and that the State was required to prove his guilt beyond a reasonable doubt—that is, adduce "proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his own affairs." Pet. App. 27a-28a; see also J.A. 13-14. The court also told the jury that it could not consider evidence of respondent's voluntary intoxication in determining whether he acted "purposely or knowingly":

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in

> determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

Pet. App. 7a-8a.

That instruction was based on a state statute, Mont. Code Ann. § 45-2-203 (1993), which provides:

> **Responsibility—intoxicated condition.** A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, injected, or otherwise ingested the substance causing the condition.

The jury convicted respondent of two counts of deliberate homicide. Pet. App. 3a.

3. The Supreme Court of Montana reversed respondent's convictions, holding that he "was denied due process when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense." Pet. App. 16a. While the court noted in passing that *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), recognized a defendant's due process "right to present a defense," Pet. App. 12a, the court relied principally on *Martin* v. *Ohio*, 480 U.S. 228 (1987), where this Court upheld Ohio's rule requiring the defendant to prove self-defense.

The court noted that *Martin* emphasized that the jury in that case was permitted to consider, in determining whether there was reasonable doubt about the State's case, the evidence offered by the defendant in support of a claim of self-defense, and that *Martin* stated that an instruction precluding the jury from considering the self-defense evidence for that purpose would "plainly run afoul" of *In re Winship*, 397 U.S. 358 (1970). Pet. App. 13a (quoting *Martin*, 480 U.S. at 233-234).

In light of that passage from *Martin*, the court concluded that the defendant in a criminal case has "a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged." Pet. App. 16a. Precluding the jury from considering relevant evidence, the court believed, lessens the State's burden under *Winship* of proving guilt beyond a reasonable doubt, because a jury that is allowed to consider such evidence could entertain a reasonable doubt as to whether the defendant acted " 'knowingly' and [*sic*, or] 'purposely.' " Pet. App. 14a; see also *id.* at 14a-15a ("The burden * * * is lessened because the defendant is precluded from presenting arguments concerning the prosecution's 'failure of proof' of the subjective mental state element."). The court reasoned that "[b]y allowing the jury to consider such evidence, we permit the jury to make its decision on all of the relevant evidence as required under *Martin*." *Id.* at 14a. Accordingly, the court declared unconstitutional the portion of Mont. Code Ann. § 45-2-203 (1993) that provides that a defendant's intoxicated condition "may not be taken into consideration in determining the existence of a mental state which is an element of the offense." *Ibid.*

SUMMARY OF ARGUMENT

The Montana legislature has made a policy determination that persons who engage in antisocial conduct, including homicide, while voluntarily intoxicated should be held criminally responsible to the same extent as if they had been sober when they committed the criminal acts. Nothing in the *Winship* line of cases, under which the State must prove each element of a criminal charge beyond a reasonable doubt, forecloses that policy choice. To the contrary, those cases make clear that the applicability of the reasonable-doubt standard has always been dependent on how a State defines the offense in the first instance. The State's policy decisions in that regard are subject to due process challenge only if the defendant demonstrates that those decisions "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445 (1992).

There is no settled tradition that a State may not define its criminal offenses so as to preclude excuses based on any form of diminished capacity, including voluntary intoxication. Under the common law of England, voluntary intoxication afforded no excuse for the crime of murder, even though intoxication might be thought logically "relevant" to one's ability to act with the required element of "malice aforethought." In this country, many States that classified murder into degrees in the mid-nineteenth century departed from the common-law rule and accepted the relevance of intoxication evidence for those murders that required proof of "specific intent." Other States, however, followed the common-law rule on

intoxication even with respect to "specific intent" crimes well into this century.

Moreover, some States precluded defendants from making an analytically indistinguishable claim—*i.e.*, that, as a result of a mental defect not amounting to legal insanity, the defendant could not form the "specific intent" required to commit the crime. In three cases this century, this Court rejected pleas from defendants who claimed that they should have been permitted to rely on that type of diminished capacity to negate the intent element of their murders. In the third of those cases, *Fisher* v. *United States*, 328 U.S. 463 (1946), the Court not only failed to see any due process problem, but also declined to prescribe a different rule under its supervisory authority over the courts of the District of Columbia. In light of that history, respondent cannot sustain his burden of demonstrating that Montana's policy choice violates a deeply rooted tradition of our people.

This Court's decision in *Martin* v. *Ohio*, 480 U.S. 228 (1987), lends no support to the decision below. *Martin* does not create a rule of constitutionally relevant evidence, see *Gilmore* v. *Taylor*, 113 S. Ct. 2112 (1993), and recognition of such a broad due process principle could cast unwarranted doubt on the validity of numerous exclusionary rules of evidence. *Martin* does indicate that *Winship* limits a State's ability to preclude defendants from attempting to create a "reasonable doubt about the State's case." That statement, however, does not aid respondent, because the State's "case" consists of proving only those facts that the legislature has made pertinent to criminal liability. *Martin* therefore cannot fairly be invoked to invalidate the legislature's policy judgment that

intoxication is irrelevant to culpability. That conclusion is not changed in any way by the Montana Supreme Court's observation that the defendant's "purpose" or "knowledge" is an "element" of murder that must be proved beyond a reasonable doubt under *Winship*. The court's observation simply begs the question, because the Montana legislature is free to provide that "purpose" and "knowledge" must be determined without regard to a defendant's voluntary intoxication. Because the Montana Supreme Court's misreading of *Martin* led to the unwarranted invalidation of that policy choice, the judgment of that court should be reversed.

ARGUMENT

DUE PROCESS DOES NOT REQUIRE STATES TO RECOGNIZE VOLUNTARY INTOXICATION OR ANY OTHER FORM OF DIMINISHED CAPACITY AS A BASIS ON WHICH DEFENDANTS MAY AVOID OR LIMIT PUNISHMENT FOR HOMICIDE

1. The Supreme Court of Montana held that federal constitutional law bars the legislature from making the policy judgment to exclude consideration of voluntary intoxication from the mental state that is necessary for the commission of a crime. That analysis is fundamentally mistaken. This Court has made clear that it is for legislatures to prescribe the conditions for criminal punishment for antisocial conduct, see, *e.g.*, *Medina* v. *California*, 505 U.S. 437, 445-446 (1992); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85-86 (1986); *Foucha* v. *Louisiana*, 504 U.S. 71, 94 (1992) (Kennedy, J., dissenting), and that courts therefore "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Medina* v. *California*, 505 U.S. at 445 (quoting *Patterson* v. *New York*, 432 U.S. 197, 201-202 (1977)). As Justice Marshall explained in *Powell* v. *Texas*, 392 U.S. 514, 536 (1968) (plurality opinion), "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the states." See also *id.* at 545 (Black, J., concurring) ("legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime" since it would be "indefensib[le]" to "impos[e] on the States any particular test of criminal responsibility"); *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in judgment) ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation"); *Eaglin* v. *Welborn*, 57 F.3d 496, 502 (7th Cir.) (*en banc*) (state may provide defense of entrapment only to those defendants who admit committing the crime, despite contrary rule in the federal system, since "[t]he Constitution does not require the states to adopt the latest and best thinking on criminal procedure or any other subject"), cert. denied, 116 S. Ct. 421 (1995).

That principle has been applied in a variety of contexts. In *Powell* v. *Texas*, *supra*, the plurality relied on it to reject a challenge to the State's power to criminalize public intoxication, which, because of

the defendant's compulsion to drink, was asserted to constitute "cruel and unusual punishment" barred by the Eighth Amendment. The plurality emphasized that "whatever may be the merits of such a doctrine of criminal responsibility," 392 U.S. at 533, this Court has "never articulated a general constitutional doctrine of *mens rea*." *Id.* at 535. In *McMillan* v. *Pennsylvania*, *supra*, the Court upheld against a due process challenge the State's decision to provide for increased punishment on the basis of a fact that it proved only by a preponderance of the evidence at sentencing, and expressly "reject[ed] the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions." 477 U.S. at 89 n.5; accord *Medina* v. *California*, 505 U.S. at 451. And, more recently, in *Schad* v. *Arizona*, 501 U.S. 624 (1991), the Court upheld the power of the State to provide that the defendant could be convicted of murder upon proof of either of two alternative mental states, neither of which required jury unanimity. Speaking for the plurality, Justice Souter explained (*id.* at 638) that "[d]ecisions about what facts are material and what are immaterial, or, in terms of *Winship* * * * what 'fact[s] [are] necessary to constitute the crime,' and therefore must be proved individually, * * * represent value choices more appropriately made in the first instance by a legislature than by a court." See also *id.* at 651-652 (Scalia, J., concurring in judgment).

The Montana statute invalidated by the court below represents an equally valid value choice about what facts are "material" to criminal responsibility and punishment. The Montana legislature has determined that "[a] person who is in an intoxicated condition is criminally responsible for his conduct" and that, accordingly, intoxication "may not be taken into consideration in determining the existence of a mental state" that otherwise is necessary to commit the crime. Mont. Code Ann. § 45-2-203 (1993). The combined effect of Montana's statutes is therefore to require proof of purposeful or knowing conduct, *apart from voluntary intoxication*, as a prerequisite to a conviction for deliberate homicide. It may well be that the mental state that the prosecution is required to prove under state law "is a watered down *mens rea*; however, this is the prerogative of the legislature." *State* v. *Ramos*, 648 P.2d 119, 121 (Ariz. 1982) (upholding statute barring evidence of intoxication on the issue whether the defendant acted "knowingly"); accord *People* v. *DelGuidice*, 606 P.2d 840, 842-844 (Colo. 1979) (same; rejecting *Winship* challenge); see also *State* v. *Souza*, 813 P.2d 1384, 1386 (Hawaii 1991).

Nothing in the Due Process Clause requires a legislature that makes certain forms of intent relevant to criminal culpability also to recognize excuses based on claims of diminished capacity at the time of the offense. A legislature is free to conclude, for example, that a claim of mental abnormality short of insanity does not diminish the moral blameworthiness of the criminal act or bear on the justness of its criminal punishment. Cf. *Bethea* v. *United States*, 365 A.2d 64, 87 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977).[1] The same is true about the state

[1] As the court noted in *Sollars* v. *State*, 316 P.2d 917, 919 (Nev. 1957), "[t]he existence of mental disorder may well be a fact. * * * It is quite another thing, however, to qualify as

of voluntary intoxication. And, where the substantive law of the State makes such a mental condition irrelevant to the defendant's responsibility, there can be no constitutional error in excluding such evidence when offered for that purpose, or in instructing the jury in accordance with state law.

2. This Court's cases bearing on the due process limits on a State's ability to preclude a defendant's claim that he lacked the mental capacity to commit the offense were thoroughly explored by the Seventh Circuit in *Muench* v. *Israel*, 715 F.2d 1124 (1983) (upholding Wisconsin rule that limits psychiatric evidence to insanity stage of bifurcated trial), cert. denied, 467 U.S. 1228 (1984); see also *Haas* v. *Abrahamson*, 910 F.2d 384, 391-397 (7th Cir. 1990). The Seventh Circuit correctly noted that this Court rejected similar claims in *Fisher* v. *United States*, 328 U.S. 463 (1946), for cases arising in the District of Columbia, as it had earlier rejected them as a rule of due process for the States in *Troche* v. *California*, 280 U.S. 524 (1929) (per curiam), and *Coleman* v. *California*, 317 U.S. 596 (1942) (per curiam). In our view, those cases are inconsistent with the broad due process theory espoused by the Montana Supreme Court in this case.

Troche involved the validity of state statutes providing for a bifurcated trial in murder cases where the defendant asserted the defense of insanity. A trial was first held on the defendant's guilt, at which he was presumed to be sane and all matters of fact tending to establish insanity were inadmissible. The

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factual the determination that a certain state of disorder *ought* to relieve one from responsibility. This is a moral, not a factual, judgment."

sanity issue was determined only after the jury found the defendant guilty. See *People* v. *Troche*, 273 P. 767, 769-770 (Cal. 1928). In holding that the trial judge properly excluded evidence of Troche's mental illness at the first stage of the proceedings, the California Supreme Court relied on the fact that California criminal law did not recognize an excuse from criminal responsibility based on a mental defect other than insanity. *Id.* at 772. Troche appealed to this Court, challenging the statutory presumption of sanity and the exclusion of the insanity evidence at the guilt stage. He contended that those rulings "conclusively presum[ed] one of the main elements of a crime against the defendant, said element being that of intent." 715 F.2d at 1138 (quoting from appellant's brief in this Court). This Court dismissed for want of a substantial federal question. 280 U.S. at 524.[2]

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[2] Such a dismissal is a ruling on the merits of the question that is binding on the lower courts until squarely overruled by this Court. See *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975); cf. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). See also *Campbell* v. *Wainwright*, 738 F.2d 1573, 1580-1582 (11th Cir. 1984) (upholding exclusion of psychiatric evidence offered to negate specific intent; *Troche* and *Coleman* "are decisions on the merits of this question binding on the circuits courts to the extent that they have not been overruled"), cert. denied, 475 U.S. 1126 (1986); *State* v. *Brom*, 463 N.W.2d 758, 764 (Minn. 1990) (relying on *Troche* and *Coleman* to conclude that "a bifurcated trial procedure in which psychiatric testimony is inadmissible on the issue of premeditation does not violate the federal due process guarantee"), cert. denied, 499 U.S. 940 (1991). That dismissal is also entitled to precedential weight in this Court, though not "to the same deference given a ruling after briefing, argument, and a written opinion." *Caban*

Coleman also involved a challenge to the California scheme for proving insanity. The defendant in *Coleman* challenged his conviction on the ground that the jury should be permitted to consider "mental abnormalities not amounting to a complete defense of legal insanity, but which still may show the lack of capacity to form the specific intent to commit first degree murder." *People* v. *Coleman*, 126 P.2d 349, 353 (1942). The California Supreme Court rejected that claim, noting that such a view was more properly addressed "to the desirability of the legislative policy, rather than to the question of deprivation of constitutional rights under the established system." *Id.* at 353. Citing its prior summary disposition in *Troche*, this Court dismissed Coleman's ensuing appeal. *Coleman*, 317 U.S. at 596.

Shortly thereafter, this Court reached the same conclusion, after briefing and argument, in a murder case prosecuted by the United States in the local courts of the District of Columbia. See *Fisher* v. *United States*, 328 U.S. 463 (1946). After a unitary trial, the defendant in *Fisher* was convicted and sentenced to death for first degree murder, an offense for which "[d]eliberation and premeditation [were] necessary elements." *Id.* at 464-465. At his trial, he was permitted to introduce testimony of his mental infirmities in support of an insanity defense, but the trial court refused to instruct the jury that such evidence should be considered in deciding whether the

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v. *Mohammed*, 441 U.S. 380, 390 n.9 (1979). As we explain below, *Fisher* rejected similar claims after briefing and argument.

killing was deliberate and premeditated.[3] This Court agreed with Fisher's submissions that the jury "could have determined from the evidence [of his mental deficiency] that the homicide was not the result of premeditation and deliberation," *id.* at 467, and that "[t]he jury might not have reached the result it did if the theory of partial responsibility for his acts which the petitioner urges had been submitted." *Id.* at 470.[4] The Court nonetheless affirmed, emphasizing

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[3] The instruction requested by the defendant provided: "The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case." *Fisher* v. *United States*, 149 F.2d 28, 29 (D.C. Cir. 1945), aff'd, 328 U.S. 463 (1946).

[4] That recognition indicates that the Court's affirmance was not based on the view that the defendant's theory of defense was adequately covered by the balance of the trial court's instructions, compare *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976) (per curiam), but on the view that the applicable substantive law, which did not recognize the defendant's theory of excuse, would have made the giving of the proposed instruction error. See also *Fisher*, 328 U.S. at 491 (Murphy, J., dissenting) ("The issue here is narrow yet replete with significance. Stated briefly, it is this: May mental deficiency not amounting to complete insanity properly be considered by the jury in determining whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder?"); *Muench* v. *Israel*, 715 F.2d at 1142 ("Under *Fisher*, it seems inescapable that it would have been proper to instruct the jury that the evidence it did in fact hear concerning the defendant's mental

(*id.* at 476) that recognition of any doctrine excusing criminal acts on the ground of "partial responsibility" would be "a radical departure from common law concepts * * * [and] more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District." As the Court noted:

> [T]here was sufficient evidence to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. In view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process.

328 U.S. at 466 (citation omitted). Indeed, the Court did not even find it appropriate to exercise its supervisory power to require the instruction sought by the defendant. *Id.* at 476-477.[5]

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illness could not be considered by it in reaching its verdict on the *mens rea* question, but only in its deliberation on the insanity question."); *Welcome* v. *Blackburn*, 793 F.2d 672, 674 (5th Cir. 1986) (upholding, as "a proper statement of Louisiana law" which is "permissible as a matter of federal constitutional law" under *Fisher*, an instruction telling the jury that "any mental disability short of legal insanity * * * cannot serve to negate specific intent and reduce the degree of the crime"), cert. denied, 481 U.S. 1042 (1987).

[5] A similar issue has arisen in the lower courts under the Insanity Reform Act of 1984, 18 U.S.C. 17, which not only restricted the defense of insanity, but also provided that "[m]ental disease or defect does not otherwise constitute a defense." *Ibid.* Several courts of appeals have concluded that, in enacting that Act, Congress did not intend to preclude claims of mental defect (short of insanity) when the purported mental abnormalities would negate the intent element of a crime. See, *e.g.*, *United States* v. *Pohlot*, 827 F.2d 889, 900-903 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); see also *id.* at 902 n.12. In our view, if Congress concludes that those courts have misread its intent on that question, it clearly would have the constitutional authority to preclude admission of such evidence on the issue of *mens rea*.

Significantly for this case, the defendant in *Fisher* relied on this Court's earlier decision in *Hopt* v. *People*, 104 U.S. 631 (1881), in which this Court had "reversed the Supreme Court of the Territory of Utah for failure to give a partial responsibility charge upon evidence of drunkenness." 328 U.S. at 475.[6] The *Fisher* Court did not disagree that, insofar as Fisher's and Hopt's crimes each required proof of deliberation and premeditation, the issues were analytically identical. See 328 U.S. at 491-493 (Murphy, J., dissenting) (arguing that *Hopt* controlled, and that the lower courts were under a "duty * * * to fashion rules to permit the jury to utilize all relevant evidence directed toward" the existence of deliberation and premeditation).[7] The Court distinguished

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[6] Respondent also relied on *Hopt* in opposing the State's petition for a writ of certiorari. See Br. In Opp. 8-9.

[7] See also *Robinson* v. *Ponte*, 933 F.2d 101, 104-105 (1st Cir. 1991) (noting the First Circuit's reluctance to hold that "federal constitutional law *compels* an instruction, where warranted by the evidence, that evidence of intoxication may be considered in deciding whether the prosecution has proved specific intent beyond a reasonable doubt," and citing, *inter alia*, *Fisher*), cert. denied, 503 U.S. 922 (1992). Indeed, Fisher argued that his claim was far more compelling than Hopt's:

Hopt, however, on the ground that "the Territory of Utah had a statute specifically establishing such a rule." 328 U.S. at 475; see also *id.* at 473 n.11 ("The Court was there considering intoxication under a statutory requirement that the intoxication should be taken into consideration by the jury in determining the degree of the offense."). Neither Congress nor the local courts of the District of Columbia, to which "[m]atters relating to law enforcement in the District [were] entrusted," had made an analogous policy choice with respect to Fisher's theory of reduced responsibility resulting from mental deficiency. *Id.* at 476.[8]

"If intoxication voluntarily induced and carried to such a degree that the accused is incapable of deliberating can reduce the crime from murder in the first degree to murder in the second degree, it certainly would appear that disease and congenital defects which the accused can neither prevent nor cure should have under similar circumstances no less effect." Petition for a Writ of Certiorari at 14, *Fisher* v. *United States*, 328 U.S. 463 (1946) (No. 122).

[8] That the Court regarded the issue as one of policy is underscored by its response to Fisher's observation that "evidence of intoxication to a state where one guilty of the crime of murder may not be capable of deliberate premeditation requires in the District of Columbia an instruction to that effect." *Fisher*, 328 U.S. at 473-475. Fisher argued that it necessarily followed that mental deficiency evidence warranted a similar instruction. While not disputing Fisher's suggestion that mental deficiency evidence was logically just as relevant as intoxication evidence, *id.* at 475, the Court determined that whether the jury should be instructed to consider mental deficiency evidence was not a matter of due process, *id.* at 466, but was a matter "more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District." *Id.* at 476; see also *Griffin* v. *United States*, 336 U.S. 704, 717 (1949) ("The conviction in [*Fisher*] was affirmed essentially on the principle that the law of evidence and procedure governing criminal trials in the District of Columbia is in the keeping of the Court of Appeals for the District and is not to be exercised by this Court").

The teaching of *Troche*, *Coleman*, and *Fisher* is that the substantive judgments about what sorts of mental characteristics—particularly claims of diminished capacity—will be deemed legally significant to excuse an individual's responsibility for criminal conduct are to be made by lawmaking bodies, not by application of the Due Process Clause. Within broad limits set by other constitutional guarantees, such as any proportionality inquiry required under the circumstances by the Eighth Amendment, cf. *Harmelin* v. *Michigan*, *supra*, it is within the competence of legislative powers to punish crimes based on proof of a mental state that assumes a defendant's "theoretical normality [apart from] his own personal traits." *Fisher*, 328 U.S. at 466. Because that is precisely the effect of the Montana statute that makes intoxication irrelevant to a defendant's *mens rea*, the court below erred in invalidating it.

3. Nothing in *In re Winship*, 397 U.S. 358 (1970), or its progeny, requires a different conclusion. *Winship* accorded substantive due process protection to the longstanding common law rule that prohibited a defendant's conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364; see also *Miles* v. *United States*, 103 U.S. 304, 312 (1881). That was far from a radical development, since "[l]ong before *Winship*, the universal rule in this country was that the prosecution must prove

guilt beyond a reasonable doubt." *Patterson* v. *New York*, 432 U.S. at 211; see also *Winship*, 397 U.S. at 361 (noting "virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions").[9] And, as subsequent decisions have made clear, *Winship* did not alter the antecedent understanding that the proof that is sufficient for conviction "must be gauged in light of the applicable [state] law." *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979); *Patterson* v. *New York*, 432 U.S. at 211 n.12 ("The applicability of the reasonable-doubt standard * * * has always been dependent on how a State defines the offense that is charged in any given case"). A State's decisions in this regard are not subject to due process challenge unless they " 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Medina* v. *California*, 505 U.S. at 445 (quoting *Patterson* v. *New York*, 432 U.S. at 201-202).

Here, there is "no historical basis for concluding" (*Medina* v. *California*, 505 U.S. at 448) that there is "a settled tradition" (*id.* at 446) that prevents a State from defining its criminal offenses so as to preclude excuses based on any form of diminished

[9] Thus, where the reasonable-doubt right was recognized as applicable, failure of the State to respect it would amount to a due process violation, even before *Winship*. See 397 U.S. at 386 (Black, J., dissenting) ("as long as a particular jurisdiction requires proof beyond a reasonable doubt, then the Due Process Clause commands that every trial in the jurisdiction must adhere to that standard"); cf. *Walker* v. *Sauvinet*, 92 U.S. 90, 93 (1876). *Winship* arose only because the state law at issue did not extend the same right to juvenile adjudications. 397 U.S. at 360.

capacity, including voluntary intoxication. As the Court noted in *Hopt* v. *People*, *supra*, "[a]t common law, indeed, as a general rule, voluntary intoxication afford[ed] no excuse, justification, or extenuation of a crime committed under its influence." 104 U.S. at 633; see also Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046 (1944) ("The early common law apparently made no concession whatever because of intoxication, however gross"); *Colbath* v. *State*, 4 Tex. Crim. 76, 77-79 (1878).[10] It was not until the mid-nineteenth century that some States began relaxing that rule, but even then only with respect to statutory crimes requiring "specific intent" for their commission. See Hall, 57 Harv. L. Rev. at 1049-1050.[11] Some States,

[10] As the court noted in *Colbath*, "[w]e find it laid down as early as the reign of Edward VI. (1548), that 'if a person that is drunk kills another, this shall be a felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but, inasmuch as that ignorance was occasioned by his own act and folly, he might have avoided it, he shall not be privileged thereby.' Plowd. 19." 4 Tex. Crim. at 77-78; see also *id.* at 78 (noting Hale's view that "such a person shall have no privilege by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses") (quoting 1 Matthew Hale, *History of the Pleas of the Crown* 32); 4 William Blackstone, *Commentaries* *26 ("The law of England, considering how easy it is to contract this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another.").

[11] The Model Penal Code recognizes intoxication as an excuse when it "negatives an element of the offense" other than recklessness. See Model Penal Code § 2.08(1) (1985). As the drafters recognized, the Code's distinction turns purely on policy choices since "[as] a matter of logic the fact of acute

however, retained the common law rule even with respect to "specific intent" offenses well into this century. See *State* v. *Shipman*, 189 S.W.2d 273, 274-275 (Mo. 1945); *State* v. *Stacy*, 160 A. 257, 268-269 (Vt. 1932).

Indeed, as demonstrated by *Troche*, *Coleman*, and *Fisher*, there was no widely-shared understanding—late into this century—that a defendant's purported lack of mental capacity to form a "specific intent" to commit murder inherently precluded his criminal responsibility, even with respect to the far more sympathetic cases posed by defendants whose asserted lack of capacity stemmed from mental abnormality rather than from their own voluntary conduct. The defendant in *Fisher* specifically urged that his proposed rule followed from Congress's decision to depart from the common law by recognizing degrees of murder. 328 U.S. at 472-473. In rejecting that claim, the Court noted that common-law murder required "malice aforethought, either express or implied," and explained that "[a]s capacity of a defendant to have malice would depend upon the same kind of evidence and instruction which is urged here, it cannot properly be said that the separation of murder into degrees introduced a new situation into the law * * *." *Id.* at 473 (footnotes omitted).[12]

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alcoholic intoxication may ground an inference that the actor did not act with the knowledge or purpose *or recklessness* required as an element of the crime." *Id.* at 352 n.7 (emphasis added).

[12] Whether or not "most of the modern [state] criminal codes provide either that intoxication is a defense if it negatives a mental state or that it is admissible in evidence whenever relevant to negate an element of the offense charged,"

The Montana Supreme Court erred in reading this Court's decision in *Martin* v. *Ohio*, *supra*, as requiring a different conclusion. *Martin* did state that it would be error under *Winship* to instruct the jury "that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case." 480 U.S. at 233; see also *Leland* v. *Oregon*, 343 U.S. 790, 794-795 (1952). That statement, however, has meaning only with reference to what "the State's case" *is*. It therefore cannot be divorced from the settled rule that "[t]he applicability of the reasonable-doubt standard * * * has always been dependent on how a State defines the offense that is charged in any given case." *Patterson* v. *New York*, 432 U.S. at 211 n.12; *McMillan* v. *Pennsylvania*, 477 U.S. at 85.[13] *Martin*'s obser-

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see 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 410(a), at 551 n.8 (1986), the issue remains one of legislative policy. There is no uniform rule in this country that evidence of voluntary intoxication must always be admitted, see 95-566 Amicus Br. of Delaware *et al.* at 4 n.1 (filed Nov. 6, 1995) (listing ten States with provisions comparable to Montana's), or that *all* purported "diminished capacity" evidence must be admitted. See also *Martin* v. *Ohio*, 480 U.S. at 236 (that all but two States had abandoned common law rule of requiring the defendant to prove self-defense did not render the rule of those two States unconstitutional).

[13] Indeed, the statement that followed the one we quote in the text indicates that the Court was concerned about an entirely different problem: "*i.e.*, [an instruction] that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard." 480 U.S. at 233-234. That type of "discrimination" against defense evidence has long been held to burden the reasonable-doubt standard, and therefore to violate *Winship*. See *Cool* v. *United States*, 409 U.S. 100, 102-104 (1972) (instruction directing jury to con-

vation was correct so far as it went, but only because it was not disputed in that case that Ohio law defined the intent element of murder in a way that made the "self-defense evidence" relevant to whether the State had proved that element beyond a reasonable doubt. Compare *Jackson* v. *Virginia*, *supra*, where the Court considered evidence of the defendant's intoxication in determining whether he acted with premeditation (443 U.S. at 325), but only after carefully noting that "[u]nder Virginia law, voluntary intoxication * * * is material to the element of premeditation and may be found to have negated it." *Id.* at 311 n.12.

It is true, as the Montana Supreme Court observed, that *mens rea*—*i.e.*, "purpose" or "knowledge"—is an "element" of the crime with which respondent was charged and that this mental element must therefore be proved beyond a reasonable doubt under *Winship*. See also *Sandstrom* v. *Montana*, 442 U.S. 510, 520-521 n.10 (1979). But that observation simply begs the question, because the Montana legislature is free to define what "purpose" and "knowledge" *mean* by regulating the factors that bear on proof of a "mental state which is an element of the offense." Mont. Code Ann. § 45-2-203. See, *e.g.*, *McMillan* v. *Pennsylvania*, 477 U.S. at 85; see also *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994); *United States* v. *Gaudin*, 115 S. Ct. 2310, 2321 (1995) (Rehnquist, C.J., concurring). *Winship* requires the prosecutor to prove the elements of the crime as those elements have been defined by the entire corpus of state law, cf. *Martin*, 480 U.S. at 235; *Engle* v. *Isaac*, 456 U.S. 107, 120-121 (1982),

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sider testimony of defense witness only if satisfied of its truth beyond a reasonable doubt).

including all relevant statutes passed by the state legislature. *Winship* does not require that courts assume the quite different task that the Montana Supreme Court undertook here—*viz.*, to invalidate a statute that makes a particular mental condition irrelevant to a defendant's responsibility, without even considering that the state legislature is free to make policy choices in the definition of crimes by refining the state of mind required for conviction. As an interpretation of *Winship* and its progeny, the analysis of the court below amounts to putting the cart before the proverbial horse.

The circularity of the Montana Supreme Court's reasoning is well illustrated by its conclusion that *Martin* and *Winship* require "the jury to make its decision on all of the relevant evidence." Pet. App. 14a. Relevance is not ordinarily understood as "an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in a case." *Huddleston* v. *United States*, 485 U.S. 681, 689 (1988) (quoting Advisory Committee's Notes on Fed. R. Evid. 401). Because the matters "properly provable" in a state criminal case traditionally have been thought to be in the province of the legislature, it is anomalous to invoke the criterion of "relevance" to invalidate a state statute that purports to provide that some matters are *not* "properly provable" in a case.

Moreover, apart from begging the question of what matters were properly provable to establish respondent's crime, there is no support in this Court's cases for the proposition that due process requires admission of "all relevant evidence" (Pet. App. 14a, 16a)

that theoretically could create a reasonable doubt about the State's case. If accepted, such a broad view of a defendant's due process rights could effectively preclude application in criminal cases of many exclusionary rules of evidence the validity of which has never before been doubted.[14] *Winship*, however, did not establish any doctrine of "constitutionally relevant evidence." *Gilmore* v. *Taylor*, 113 S. Ct. 2112, 2118-2119 (1993); accord *Michigan* v. *Lucas*, 500 U.S. 145, 149 (1991) (the fact that state evidentiary rules "operate[] to prevent a criminal defendant from presenting relevant evidence * * * does not necessarily render [them] unconstitutional" under the Sixth Amendment).[15]

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[14] Under the broad due process principle articulated by the Montana Supreme Court, a criminal defendant could claim an absolute right to impeach government witnesses with ancient convictions, see Fed. R. Evid. 609, to introduce logically relevant expert testimony that is insufficiently reliable to amount to "scientific knowledge," see Fed. R. Evid. 702; *Daubert* v. *Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2795 (1993), or to introduce evidence of his co-defendant's "other wrongs" to demonstrate that co-defendant's "propensity" to commit crimes and thus the likelihood that he, rather than the defendant, was the guilty party, see Fed. R. Evid. 404(b).

[15] That is not to say, of course, that there are no due process limits to the State's ability to exclude evidence from a criminal case. The Due Process Clause "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)); see *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 (1987); *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973); see also *Jackson* v. *Virginia*, 443 U.S. at 314-315 (distinguishing *Winship* right from the due process right of "a meaningful opportunity to defend"). In our view, that separate due process right is not at issue here, because its existence necessarily turns on a recognition by the law that defines the crime that the claim being advanced by the defendant would provide grounds for an acquittal.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted.

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JANUARY 1996

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 405017 40045